IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RODERICK REED,	)	
	)	
Plaintiff,	)	**CIVIL ACTION**
	)	
v.	)	
	)	**No. 01-3205-KHV**
MIKE SIMMONS, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Roderick Reed brings suit against various police officers in the Police Department of Kansas City, Kansas. Under 42 U.S.C. § 1983, plaintiff alleges that defendants violated his constitutional rights by arresting him on two separate occasions because of race and without probable cause.[1] This matter is before the Court on Defendants' Motion For Summary Judgment (Doc. #55) filed October 3, 2003. For reasons stated below, the Court sustains defendants' motion.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); accord Anderson

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[1] On June 29, 2001, the Honorable G.T. VanBebber dismissed Tristram Hunt, an assistant district attorney, because he is immune from suit under Section 1983. See Order (Doc. #4). On September 27, 2002, Judge VanBebber dismissed the Police Department because it is not an entity capable of being sued. See Order (Doc. #34).

On September 27, 2002, plaintiff filed an amended complaint which also joined the Wyandotte County Board of Commissioners as a defendant. See amended Complaint Under the Civil Rights Act (Doc. #35). On July 25, 2003, Judge VanBebber dismissed the Board because it is not liable for the acts of the assistant district attorney. See Order (Doc. #51).

v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. Applied Genetics, 912 F.2d at 1241.

"[W]e must view the record in a light most favorable to the parties opposing the motion for summary judgment." Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

The Court affords a *pro se* plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers, *pro se* litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992), cert. denied, 507 U.S. 940 (1993). The Court may not assume the role of advocate for a *pro se* litigant. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Plaintiff's Memorandum In Opposition

On February 13, 2004, the Court granted plaintiff an extension of time to respond to defendant's motion for summary judgment. See Order (Doc. #71). In that order, the Court noted:

> Plaintiff is advised that any brief in opposition to defendants' motion for summary judgment shall begin with a statement of facts pursuant to D. Kan. Rule 56.1(b).[2] To the extent plaintiff includes counter-affidavits, declarations or other materials, they shall comply with

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[2] D. Kan. Rule 56.1(b) provides:

> (1) A memorandum in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of movant's fact that is disputed.
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> (2) If the party opposing summary judgment relies on any facts not contained in movant's memorandum, that party shall set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by subsection (a), above. All material facts set forth in this statement of the non-moving party shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the reply of the moving party.

> Rule 56(e),[3] Fed. R. Civ. P., and D. Kan. Rule 56.1(d).[4] Any assertion in defendants' factual statement, which is adequately supported by record evidence, will be taken as true unless plaintiff specifically contradicts the factual assertion with appropriate evidence. If plaintiff does not file a memorandum in compliance with these rules, such failure may result in the entry of summary judgment in defendants' favor.

Id. at 3-4.

On February 23, 2004, plaintiff filed an opposition brief. See Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment (Doc. #72). Plaintiff's opposition brief does not set forth the specific paragraphs in defendants' memorandum that are disputed, does not specifically contradict defendants' factual assertions with reference to those portions of the record upon which plaintiff

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[3] Rule 56(e), Fed. R. Civ. P., provides:

> Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

[4] D. Kan. Rule 56.1(d) provides:

> All facts on which a motion or opposition is based shall be presented by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions. Affidavits or declarations shall be made on personal knowledge and by a person competent to testify to the facts stated which shall be admissible in evidence. Where facts referred to in an affidavit or declaration are contained in another document, such as a deposition, interrogatory answer, or admission, a copy of the relevant excerpt from the document shall be attached.

relies, does not set forth additional facts in separately numbered paragraphs and does not include any affidavits, declarations or other materials in compliance with Rule 56(e), Fed. R. Civ. P.[5]

Despite the obvious deficiencies in plaintiff's brief, the Court previously noted that many of his factual assertions appeared to be based on personal knowledge and would be admissible if included in an affidavit or declaration.[6] See Order (Doc. #75) filed March 15, 2004 at 3. Accordingly, the Court granted plaintiff leave to file an amended memorandum in opposition to defendants' motion for summary judgment, on or before March 29, 2004, with affidavits, declarations or other materials in compliance with Rule 56(e), Fed. R. Civ. P. See id. To date, plaintiff has not filed an affidavit or declaration in compliance with the pertinent rules and court order. Accordingly, under D. Kan. Rule 56.1(b), the Court accepts as true defendants' factual statements, which are adequately supported by record evidence.

Factual Background

For purposes of defendants' motion for summary judgment, the following facts are uncontroverted, deemed admitted or, where disputed, viewed in the light most favorable to plaintiff.

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[5] A *pro se* prisoner's complaint, when sworn and made under penalty of perjury, is treated as an affidavit on a motion for summary judgment. See Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997). Here, plaintiff's original and supplemental complaints are sworn under penalty of perjury, but they lack the factual detail necessary to decide defendants' motion for summary judgment. The Court has used some limited facts from plaintiff's complaints to provide necessary factual background, but those facts are insufficient to survive defendants' motion for summary judgment.

[6] In his opposition brief, plaintiff has not attached any affidavits, but he states that "everything in this motion is true." Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment (Doc. #72) filed February 23, 2004 at 19. Plaintiff's statement is not sufficient for the Court to treat the factual assertions in his opposition brief as admissible evidence for purposes of defendants' motion for summary judgment. See D. Kan. Rule 56.1; Fed. R. Civ. P. 56(e); cf. 28 U.S.C. § 1746 (valid declaration under penalty of perjury must be in substantially following form: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).").

In July of 1999, plaintiff attempted to remove a 1987 four-door Maxima from the house of Dana Colon, his former girlfriend. Michael Simmons, a police officer in the Police Department of Kansas City, Kansas ("KCK"), reviewed the vehicle's notarized certificate of title – which was in Colon's name.[7] Simmons released the car to Colon and advised plaintiff not to touch the vehicle. On October 4, 1999, at approximately 8:00 a.m., Simmons, plaintiff and Colon appeared in municipal court in Kansas City, Kansas on a criminal damage complaint against plaintiff. The municipal judge continued the matter until October 18, 1999 and orally advised plaintiff to stay away from Colon and her residence.

At approximately 12:30 p.m. that afternoon, Simmons observed plaintiff in a 1987 four-door Maxima. Later that day, Colon reported her car stolen. At approximately 7:00 p.m. that evening, while Simmons was at Colon's residence, plaintiff called Colon and told her that he had removed the car. At approximately 7:15 p.m., plaintiff arrived at Colon's residence and attempted to contact her.

Shortly thereafter, Sergeant Macon and Officer Burgtorf arrived at Colon's residence to assist. At approximately 8:00 p.m., Detective Jason Sutton also arrived. Officer Burgtorf told Detective Sutton that (1) plaintiff was in custody for theft of a 1987 four-door Maxima from Colon's residence that day, (2) plaintiff told her that he had possession of the car, (3) she had seen the title to the car on a previous disturbance between plaintiff and Colon, and (4) she was familiar with the car and knew that Colon was

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[7] Plaintiff claims that in early July of 1999, he reported to the Police Department of Independence, Missouri that his car had been stolen from his residence. In support, plaintiff cites only the police reports. See Exhibits A and B to Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment (Doc. #72). The police reports are not properly authenticated under D. Kan. Rule 56.1(d) and the Court therefore excludes them. In any event, the police reports only show that plaintiff reported the car as stolen, not that defendants knew that plaintiff had made such a report or that they knew plaintiff was the actual owner of the car.

the owner. Sutton also spoke to Colon who told him that (1) she had called police to report her car stolen; (2) plaintiff had gone to her home in violation of a no-contact order by the municipal judge; (3) plaintiff had no legal rights to the car and his name was not on the title; (4) plaintiff had admitted to Colon that he had taken the car that day; (5) plaintiff did not have permission to take the car; and (6) the car's value was about $2,000.

Based on Colon's statement, plaintiff's admission that he had possession of the car, and Simmons' review of the car title three months earlier, Simmons and Detective Sutton arrested plaintiff for auto theft and trespassing. See plaintiff's Civil Rights Complaint (Doc. #1) at 2 (Sutton arrested plaintiff at direction of Simmons); amended Complaint Under the Civil Rights Act (Doc. #35) at 2 (Simmons, Sutton and other officers arrested plaintiff). As he was being arrested, plaintiff tried to explain that he actually owned the car, but Simmons and Detective Sutton ignored him. See plaintiff's Civil Rights Complaint (Doc. #1) at 2; amended Complaint Under the Civil Rights Act (Doc. #35) at 2.

Later that evening, at the Police Department, plaintiff gave a statement to Detective Sutton. Plaintiff asserted that the car was not titled, that he did not have a copy of the title, that the vehicle was at an unknown "Safe Lite Auto Glass," that he had removed the car from Colon's home using a set of keys in his possession and that he intended to keep the car.[8]

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[8] On October 16, 1999, plaintiff apparently told Independence police officers that he suspected that Colon and her new boyfriend, Officer Mike Simmons, stole his car in July of 1999. See Independence Missouri Police Case Report Dated October 16, 1999 at 3, Exhibit B to Plaintiff's Memorandum In Opposition To Defendants' Motion For Summary Judgment (Doc. #72). As explained above, the Court excludes the police report because it is not properly authenticated. Even if the Court considered the police report, it reflects only plaintiff's suspicion and does not show that Simmons lacked probable cause to believe that plaintiff had stolen the car from Colon on October 4, 1999.

Officer Pamela Bennett transported plaintiff to the Wyandotte County Jail and booked him on auto theft charges. Plaintiff was also cited for trespassing on Colon's property.

On February 6, 2000, Brian Dupree, a former KCK police officer, was dispatched to Club Uptown in Kansas City, Kansas on a disturbance call. Colon told Dupree that inside Club Uptown, plaintiff had pulled her hair and thrown her down on the ground. Colon also reported that plaintiff then damaged her vehicle by flattening all four tires and scratching it. Colon told Dupree that plaintiff had fled before officers arrived.

Several days later, the Police Department further investigated the incident at Club Uptown. On February 14, 2000, Detective Krstolich interviewed a security guard who had been working at Club Uptown on February 6. The security guard stated that the suspect and Colon were shoving each other and that the suspect hit her with his fist. Two security guards immediately broke up the fight and physically removed the suspect from the club. The security guard, however, could not positively identify the suspect from a photo line-up.

On February 15, 2000, Detective York interviewed Regina Shepherd, who said that she had gone to Club Uptown with Colon on February 6. Shepherd stated that the suspect grabbed Colon's neck and also grabbed Colon's keys when security asked him to leave. She said that security officers retrieved the keys and escorted the suspect from the bar. Shepherd also picked plaintiff out of a photo line-up and said that she was reasonably certain that plaintiff was the individual who committed the acts at Club Uptown.

Later on February 15, Detective York met with Tristram Hunt, an assistant district attorney, regarding the incident at Club Uptown. Based on the full investigative file (which included recorded statements of Colon and the security guard at Club Uptown), Hunt drafted an affidavit for a warrant to

arrest plaintiff for battery. Hunt and Detective York signed the affidavit. Later that day, Wyandotte County District Judge Ernie Johnson signed a warrant for plaintiff's arrest. The decision to seek a warrant was based solely on the statements of Colon, Shepherd and the security guard at Club Uptown, and the photo identification by Shepherd.

On April 18, 2000, the District Court of Wyandotte County dismissed the auto theft charge against plaintiff for lack of evidence. See Order Of Dismissal filed April 18, 2000, attached to plaintiff's Civil Rights Complaint (Doc. #1). On June 8, 2000, the District Court of Wyandotte County dismissed the battery charge against plaintiff because the "witness . . . relocated out of state." See Order Of Dismissal filed June 8, 2000, attached to plaintiff's Civil Rights Complaint (Doc. #1).

Under 42 U.S.C. § 1983, plaintiff alleges that his arrests in October of 1999 and February of 2000 violated his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. In particular, plaintiff alleges that his arrests were without probable cause and because of his race.

Defendants argue that they are entitled to qualified immunity on plaintiff's Fourth Amendment claims because (1) both arrests were supported by probable cause and (2) a reasonable police officer could have believed that the arrests were supported by probable cause. Defendants also argue that they are entitled to summary judgment on (1) plaintiff's Fifth Amendment due process claim because they are entitled to summary judgment on his more specific Fourth Amendment claim, (2) plaintiff's Eighth Amendment claim because it does not protect pretrial detainees and (3) plaintiff's Fourteenth Amendment claim for selective arrest because plaintiff cannot show that he was arrested because of race.

Analysis

I. Fourth Amendment Claims

Defendants assert the defense of qualified immunity. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The affirmative defense of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Gross v. Pirtle, 245 F.3d 1151, 1155 (10th Cir. 2001) (quoting Malley v. Briggs, 475 U .S. 335, 341 (1986)). Once the defense has been raised, plaintiff has the burden to establish both that defendant's actions violated a constitutional or statutory right and that the right was "clearly established" at the time of the relevant conduct. See Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001). Ordinarily, to demonstrate that a law is clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992); see Anderson v. Creighton, 483 U.S. 635, 640 (1987) (right is clearly established if contours of right are sufficiently clear that reasonable official would understand that what he is doing violates that right). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 194-95 (2001). If plaintiff satisfies this two-part burden, defendant must demonstrate that his actions were objectively reasonable in light of the law and the information he possessed at the time. See Martin v. Bd. of County Comm'rs, 909 F.2d 402, 405 (10th Cir. 1990).

A. Warrantless Arrest On October 4, 1999

Defendants first argue that plaintiff cannot show that his arrest on October 4, 1999 violated his constitutional rights. A police officer may make a warrantless arrest if he has probable cause to believe that an individual has committed or is committing a crime. See Thompson v. City of Lawrence, Kan., 58 F.3d 1511, 1515 (10th Cir. 1995); United States v. Maher, 919 F.2d 1482, 1485 (10th Cir. 1990). Probable cause exists if the arresting officer knows of facts and circumstances which are reasonably trustworthy and sufficient to lead a prudent person to believe that the individual has committed or is committing an offense. See Thompson, 58 F.3d at 1515. This determination must be made "in light of circumstances and facts as they would have appeared to a prudent, cautious, trained police officer." Maher, 919 F.2d at 1485-86.

In civil rights cases which challenge the validity of a warrantless arrest, the Tenth Circuit has noted that the question of probable cause is ordinarily one of fact for the jury:

> It is true that the issue of probable cause ordinarily is for the judge rather than the jury. That is because the issue usually arises in the context of a motion to suppress evidence, which the judge decides. But where the issue arises in a damage suit, it is . . . a proper issue for the jury if there is room for a difference of opinion. The underlying issue in deciding whether the police had probable cause to do what they did is reasonableness, which is also the underlying issue in deciding negligence--a classic jury issue.

DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990), cert. denied, 502 U.S. 814 (1991).

Simmons and Sutton have submitted affidavits which state that they arrested plaintiff for auto theft based solely on the victim statement of Colon, plaintiff's statement that he had possession of the car and was unwilling to return it, and plaintiff's unwillingness to disclose the location of the car. See Simmons Affidavit ¶ 8; Sutton Affidavit ¶ 7. In his affidavit, Simmons states that he also relied on a prior review of the vehicle's certificate of title. See Simmons Affidavit ¶ 8. Based on his review of the car title three

months earlier, Colon's statement that the car was stolen and plaintiff's admission that he had possession of the car, Simmons had probable cause to believe that plaintiff had stolen the car.[9] Plaintiff has not offered any admissible evidence which contradicts the affidavits of Simmons and Sutton on this issue. Therefore, the Court sustains defendants' motion for summary judgment on plaintiff's Fourth Amendment claim based on his arrest on October 4, 1999.

B. Arrest On February 16, 2000

Defendants argue that plaintiff cannot show that his arrest on February 16, 2000 violated his constitutional rights. Plaintiff's arrest on February 16, 2000 was pursuant to an arrest warrant signed by Wyandotte County District Judge Ernie Johnson based on an affidavit by York. To comply with the Fourth Amendment, an arrest warrant must be based on "a substantial probability that a crime has been committed and that a specific individual committed the crime." Taylor v. Meacham, 82 F.3d 1556, 1562 (10th Cir.) (quotation omitted), cert. denied, 519 U.S. 871 (1996). Based on the statements of Colon, Shepherd and the security guard at Club Uptown, and the photo identification by Shepherd, Detective York sought an arrest warrant. In doing so, Detective York had substantial justification to believe that plaintiff had

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[9] In the alternative, a reasonable officer could have believed that probable cause existed to arrest plaintiff. In the context of a warrantless arrest, defendants are "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest the plaintiff." Romero v. Fay, 45 F.3d 1472, 1476 (10th Cir. 1995); see Hunter v. Bryant, 502 U.S. 224, 228 (1991) (arresting officers entitled to qualified immunity if at moment arrest was made, facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant prudent man in believing that individual had violated law); Thompson, 58 F.3d at 1515. "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." Romero, 45 F.3d at 1476 (quotations omitted). Based on the officer's review of the car title three months earlier, Colon's statement that the car was stolen and plaintiff's admission that he had possession of the car, a reasonable officer could have believed that probable cause existed to arrest plaintiff for auto theft.

committed the crime of battery.[10] See K.S.A. § 21-3412. Plaintiff has not offered any admissible evidence which contradicts the affidavit of Detective York. Accordingly, the Court sustains defendants' motion for summary judgment on plaintiff's Fourth Amendment claim based on his arrest on February 16, 2000.

II. Fifth Amendment Claims

The rights of pretrial detainees are controlled by the Fifth and Fourteenth Amendments, which "prohibit punishment prior to an adjudication of guilt in accordance with due process of law." Berry v. City of Muskogee, Okla., 900 F.2d 1489, 1493 (10th Cir. 1990); see Bell v. Wolfish, 441 U.S. 520, 535 (1979). The basis of plaintiff's due process claims are violations of the Fourth Amendment. Where government conduct is constrained by an explicit textual source of constitutional protection – such as the Fourth Amendment's warrant and probable cause requirements – "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Graham v. Connor, 490 U.S. 386, 395 (1989); see Albright v. Oliver, 510 U.S. 266, 273-74 (1994); Berry v. City of Muskogee, 900 F.2d 1489, 1492 n.2 (10th Cir. 1990). Because plaintiff's arrests did not violate the Fourth Amendment, they also did not violate his rights under the due process clause. See Case v. Milewski, 327 F.3d 564, 568 (7th Cir. 2003) (if seizure passes muster under Fourth Amendment, it should

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[10] In the alternative, a reasonable officer could have believed that the affidavit for the arrest warrant was based on probable cause. A public officer whose request for an arrest warrant is alleged to have caused an illegal arrest is shielded by qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." Malley v. Briggs, 475 U.S. 335, 344- 45 (1986). "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." Id. at 341. Based on the statements of Colon, Shepherd and the security guard at Club Uptown, and the photo identification by Shepherd, a reasonable officer could have believed that probable cause existed for an arrest warrant of plaintiff for battery.

also satisfy requirements of due process clause); Ahern v. O'Donnell, 109 F.3d 809, 818-19 (1st Cir. 1997) (same); McKinney v. George, 726 F.2d 1183, 1187 (7th Cir. 1984) (same); see also Graham, 490 U.S. at 395 (all claims that officers used excessive force in course of arrest, investigatory stop or other "seizure" of free citizen analyzed under Fourth Amendment rather than substantive due process approach). The Court therefore sustains defendants' motion for summary judgment on plaintiff's Fifth Amendment claim.

III. Eighth Amendment Claim

Defendants argue that the Eighth Amendment does not apply because plaintiff was not convicted at the time of his arrests. The Court agrees. As noted above, pretrial detainees are entitled to protection under the due process clauses of the Fourth and Fourteenth Amendments. Eighth Amendment scrutiny is appropriate only after the State has secured a formal adjudication of guilt in accordance with due process of law. Ingraham v. Wright, 430 U.S. 651, 671-672, n.40 (1977); see City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Bell, 441 U.S. at 535 n.16. Here, plaintiff was not convicted at the time in question. The Eighth Amendment therefore has no application and the Court sustains defendants' motion for summary judgment on plaintiff's Eighth Amendment claim.

IV. Fourteenth Amendment Claim

Plaintiff alleges that defendants arrested him because of race in violation of his rights to equal protection under the Fourteenth Amendment. Defendants argue that they are entitled to summary judgment because plaintiff cannot present any evidence of racial animus or disparate treatment.

The Equal Protection Clause of the Fourteenth Amendment precludes selective enforcement of the law based on considerations such as race. See Whren v. United States, 517 U.S. 806, 813 (1996). The

constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Id. To support a claim of racially selective law enforcement, plaintiff must demonstrate that defendants' actions had a discriminatory effect and were motivated by a discriminatory purpose. Marshall v. Columbia Lea Regional Hosp., 345 F.3d 1157, 1168 (10th Cir. 2003) (citing United States v. Armstrong, 517 U.S. 456, 465 (1996)). The discriminatory purpose need not be the only purpose, but it must be a motivating factor in the decision. Marshall, 345 F.3d at 1168. To withstand a motion for summary judgment, a plaintiff in a Section 1983 suit alleging racial discrimination in an arrest must present evidence from which a jury could reasonably infer that the law enforcement officials were motivated by a discriminatory purpose and that their actions had a discriminatory effect. Id.

Defendants have presented affidavits which state that race played no role in their decision to arrest plaintiff for auto theft on October 4, 1999 or in their decision to seek a warrant for plaintiff's arrest for battery on February 16, 2000. Plaintiff has not come forward with any admissible evidence that either arrest was racially motivated or had a discriminatory effect. Absent admissible evidence on these issues, and in light of defendants' affidavits, the Court must sustain defendants' motion for summary judgment on plaintiff's Fourteenth Amendment claim. See Marshall, 345 F.3d at 1168.

IT IS THEREFORE ORDERED that Defendants' Motion For Summary Judgment (Doc. #55) filed October 3, 2003 be and hereby is **SUSTAINED**.

Dated this 3rd day of May, 2004, at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge